Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20054

In re Applications of	)	
	)	
Ameritech Corp.,	)	
Transferor,	)	
	)	
AND	)	
	)	
SBC Communications Inc.,	)	CC Docket No. 98-141
Transferee,	)	
	)	
For Consent to Transfer Control of	)	
Corporations Holding Commission Licenses and	)	
Lines Pursuant to Sections 214 and	)	
310(d) of the Communications Act and	)	
Parts 5, 22, 24, 25, 63, 90, 95, and 101 of the	)	
Commission's Rules	)	
	)	
Birch Telecom, Inc. Request for Interpretation of	)	
Most-Favored Nation Condition	)	

COMMENTS OF SBC COMMUNICATIONS INC.

Pursuant to the Public Notice issued March 30, 2001,[1] SBC Communications Inc. (SBC) opposes Birch Telecom, Inc.'s (Birch) request that the Common Carrier Bureau interpret paragraph 43 of SBC/Ameritech Merger Conditions[2] to permit it (Birch) to incorporate a provision relating to reciprocal compensation from an existing agreement into current or future

[1] Common Carrier Bureau Seeks Comment on Letters Filed by Verizon and Birch Regarding Most-Favored Nation Condition of SBC/Ameritech and Bell Atlantic/GTE Orders, DA 01-722, rel. March 30, 2001 (Public Notice).

[2] *Applications of Ameritech Corp., Transferor, and SBC Communications Inc., Transferee, for Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22,24, 25, 63, 90, 95, and 101 of the Commission's Rules*, CC Docket 98-141, *Memorandum Opinion and Order*, 14 FCC Rcd 14712, Appendix C (1999) (*SBC/Ameritech Merger Order*).

agreements in other states. Although couched as a request for interpretation, Birch's request actually would require a rewrite of SBC's voluntary MFN commitment, expanding its scope well beyond that contemplated by SBC when the commitment was offered. The Bureau itself implicitly acknowledges as much by asking whether there are grounds to modify SBC's commitment. As discussed in greater detail below, there are no such grounds, and, in any event, the Bureau lacks authority unilaterally to modify SBC's MFN commitment. Nor can it reasonably interpret that commitment as Birch suggests.

I. SBC'S MFN COMMITMENT DOES NOT EXTEND TO RECIPROCAL COMPENSATION ARRANGEMENTS.

On July 24, 1998, SBC and Ameritech filed joint applications pursuant to sections 214(a) and 310(d) of the Communications Act, requesting Commission approval of the transfer of control to SBC of licenses and lines owned or controlled by Ameritech. Almost a year later, SBC and Ameritech supplemented their original application by submitting on July 1, 1999, a package of voluntary commitments designed to alleviate purported public interest concerns stemming from the merger identified by Commission staff.[3] The Commission accepted these commitments as sufficient to render the transfer of licenses and authorizations from Ameritech to SBC in the public interest, and adopted the commitments as conditions (Merger Conditions) of the Commission's approval of SBC's and Ameritech's joint applications.[4]

Included amongst the Merger Conditions is SBC's voluntary commitment to:

---

[3] Letter of Richard Hetke, Senior Counsel, Ameritech Corporation, and Paul Mancini, General Attorney and Assistant General Counsel, SBC Communications Inc., to Magalie Roman Salas, Secretary, FCC (July 1, 1999). SBC and Ameritech subsequently clarified their commitments on August 27, 1999, and in further *ex parte* filings in September 1999. *SBC/Ameritech Merger Order*, 14 FCC Rcd 14712 at para. 45.

[4] *SBC/Ameritech Merger Order*, 14 FCC Rcd 14712, paras. 2-4.

> make available to any requesting telecommunications carrier in the SBC/Ameritech Service Area within any SBC/Ameritech State any interconnection arrangement or UNE in the SBC/Ameritech Service Area within any other SBC/Ameritech State that (1) was negotiated with a telecommunications carrier, pursuant to 47 U.S.C. § 252(a)(1), by an SBC/Ameritech incumbent LEC that at all times during the interconnection agreement was an affiliate of SBC and (2) has been made available under an agreement to which SBC/Ameritech is a party.[5]

Notwithstanding the plain language of the foregoing "most-favored nation" (or MFN) provision, Birch has asked the Bureau to interpret paragraph 43 of the Merger Conditions to permit it to incorporate a provision relating to reciprocal compensation from an agreement with Sage Telecom, Inc., approved by the Texas Public Utility Commission, into its current and/or future interconnection agreements in Oklahoma, Texas, Kansas and Missouri.[6] Birch's request should be denied. In the first place, SBC's MFN obligation under paragraph 43 is limited only to "interconnection arrangement[s]" or "UNE[s];" reciprocal compensation is neither, and therefore is not available for adoption pursuant to paragraph 43. Second, even if reciprocal compensation were an interconnection arrangement or a UNE, paragraph 43 obligates SBC to make available to CLECs only such arrangements or UNEs that SBC makes available. However, an integral aspect of reciprocal compensation is SBC payment to another LEC for its transport and termination of SBC traffic, and therefore is outside the scope of paragraph 43.

A. Reciprocal compensation is not an interconnection arrangement or UNE subject to MFN under paragraph 43.

Although it does not so state, the central premise of Birch's request is that reciprocal compensation provisions are UNEs or interconnection arrangements, which, as noted above, are

---

[5] *Id.* at Appendix C, para. 43.

[6] Letter of John Ivanuska, Vice President, Regulatory & Carrier Relations, Birch, to Carol Mattey, Deputy Chief, Common Carrier Bureau, FCC (March 6, 2001) (Birch Letter).

the sole subjects of SBC's MFN obligation under paragraph 43. That premise, however, is incorrect. Reciprocal compensation is paid for the transport and termination of local traffic. 47 U.S.C. § 251(b)(5). Transport and termination is not interconnection; nor is it a network element. Consequently, it is not available for adoption pursuant to paragraph 43.

The Telecommunications Act of 1996 clearly and specifically distinguishes between transport and termination (which is the subject of reciprocal compensation) and interconnection. Interconnection is the physical linking of two carriers' networks for the exchange of traffic; transport and termination of telecommunications is what each carrier does with the other's traffic *after* it has been exchanged.

This distinction is evident from the structure of the Act. Section 251(b)(5) sets forth the duty of a LEC to establish reciprocal compensation arrangements for the transport and termination of telecommunications. Section 251(c), which follows, begins by stating: "*In addition to the duties contained in subsection (b), . . .* " and then sets forth additional obligations of incumbent LECs, including the duty to provide interconnection on "rates, terms, and conditions that are just, reasonable, and nondiscriminatory." 47 U.S.C. § 251(c)(2)(D). The fact that section 251(c)(2) makes no reference to reciprocal compensation, which is addressed in an entirely different section, makes clear that reciprocal compensation is not a term or condition of interconnection.[7]

That "reciprocal compensation" is not subsumed within "interconnection" is further confirmed by section 252(d), which establishes entirely different pricing standards for interconnection and network elements on the one hand, and reciprocal compensation on the

[7] For the same reasons, reciprocal compensation is not a UNE. UNEs are the subject of section 251(c)(3), which, like section 251(c)(2), makes no mention of reciprocal compensation.

other. Compare 47 U.S.C. § 252(d)(1) with 47 U.S.C. § 252(d)(2). If reciprocal compensation were subsumed within interconnection (or, for that matter, network elements) as Birch seems to suggest, there would have been no need for Congress to establish a different pricing standard for reciprocal compensation. The fact that it did confirms that reciprocal compensation arrangements are not interconnection arrangements, nor are they UNEs.

The Commission itself has recognized the distinction between interconnection and reciprocal compensation. In the *Local Competition Order*, the Commission confirmed that "interconnection" refers only to the physical linking of two networks and does not include the transport and termination of traffic (and thus reciprocal compensation arrangements) within the meaning of section 251(b)(5). In particular, the Commission stated:

> We conclude that the term "interconnection" under section 251(c)(2) refers only to the physical linking of two networks for the mutual exchange of traffic . . . **and not the transport and termination of traffic** . . .[8]

Any doubt that the parties did not intend or understand SBC's MFN commitment to extend to reciprocal compensation is removed by the express exclusion of "pric[ing]" from paragraph 43.[9] Reciprocal compensation inherently is a pricing term – that is, it is the price each carrier is required to pay to the other to transport and terminate its traffic. Accordingly, reciprocal compensation is beyond the ambit of paragraph 43.

---

[8] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499 at para. 176 (1996) (*Local Competition Order*) (noting, further, that the statute establishes entirely separate pricing standards for reciprocal compensation and interconnection).

[9] *SBC/Ameritech Merger Order*, 14 FCC Rcd 14712, Appendix C. at para. 43 ("Exclusive of price . . . qualifying interconnection arrangements or UNEs shall be made available to the same extent and under the same rules that would apply to a request under 47 U.S.C. § 252(i) . . . The price(s) for such interconnection arrangement or UNE shall be established on a state-specific basis pursuant to 47 U.S.C. § 252 to the extent applicable.").

B. Reciprocal compensation is beyond the scope of paragraph 43 in any event because an integral aspect of reciprocal compensation is payment by SBC to other carriers for services they provide to SBC.

Even if transport and termination (and thus reciprocal compensation) were an interconnection arrangement or UNE, which it is not, it would be outside the scope of paragraph 43. That paragraph requires SBC to make available only interconnection arrangements and UNEs that SBC provides to other carriers.[10] However, an integral component of reciprocal compensation SBC's payment to other LECs for transport and termination they provide to SBC. Reciprocal compensation therefore could not reasonably be construed to be within the scope of SBC's MFN obligation under paragraph 43, which, as discussed above, focuses solely on interconnection arrangements and UNEs provided by SBC to other carriers.

Congress's exclusion of reciprocal compensation from the 1996 Act's MFN provision, and SBC's exclusion of it from its MFN commitment, is not surprising. A requesting carrier is not permitted under either provision to adopt the reciprocal compensation provisions of another carrier's agreement because each carrier's reciprocal compensation rates are to be based on its *own* costs. Section 252(d)(2) of the Act requires that reciprocal compensation must "provide for the mutual and reciprocal recovery by *each* carrier of costs associated with the transport and termination on *each* carrier's network facilities of calls that originate on the network facilities of the other carrier." 47 U.S.C. § 252(d)(2). Because reciprocal compensation thus must reflect the costs of the carrier receiving payment, reciprocal compensation arrangements are not within the purview of the MFN provisions of the Act and paragraph 43 of the Merger Conditions.

Birch nevertheless argues, based on a Bureau letter interpreting a similar provision in the Bell Atlantic/GTE merger conditions, that it is entitled under SBC's MFN commitment to adopt

---

[10] *SBC/Ameritech Merger Order*, 14 FCC Rcd 14712, Appendix C at para. 43.

reciprocal compensation provisions from interconnection agreements with other carriers or from other SBC states.[11] In that letter, the Bureau concluded that the plain language of the Bell Atlantic/GTE Merger Order's MFN provision permits carriers to import entire interconnection agreements from one state into another, and, consequently, that reciprocal compensation arrangements are encompassed within that provision.[12]

However, Birch ignores that the MFN provision in the Bell Atlantic/GTE conditions differs materially from SBC's MFN commitment, rendering the Bureau's analysis of the Bell Atlantic/GTE MFN provision wholly inapposite. As previously discussed, paragraph 43 is strictly limited to "interconnection arrangement[s]" and "UNE[s]." In contrast, the Bell Atlantic/GTE MFN provision extends to "any interconnection arrangement, UNE or provisions of an interconnection agreement **(including an entire agreement)** subject to 47 U.S.C. § 251(c) . . ."[13] Because, in contrast, paragraph 43 does not extend to "an entire agreement" or "provisions of an interconnection agreement," the Bureau's interpretation of the Bell Atlantic/GTE provision is irrelevant here.[14]

---

[11] Birch Letter at 2 (citing Letter of Carol E. Mattey, Deputy Chief, Common Carrier Bureau, FCC to Michael Shor, Swidler Berlin Shereff Friedman, LLP (December 12, 2000) (December 12 Bureau Letter).

[12] *Id.*

[13] Public Notice, DA 01-722 at 1-2 (quoting *Bell Atlantic/GTE Merger Order*, 15 FCC Rcd 14171, Appendix D at para. 32) (emphasis added).

[14] SBC expects that Birch, or some other party, may argue that the term "interconnection arrangement" in SBC's MFN commitment encompasses reciprocal compensation based on language in the Bureau's December 12 Letter that, "in the *Bell Atlantic/GTE Merger Order*, the Commission articulated its understanding of the term 'interconnection arrangement' to encompass 'entire interconnection agreements or selected provisions from them.'" December 12 Bureau Letter (quoting *Bell Atlantic/GTE Merger Order*, 15 FCC Rcd at 14171). However, the Commission expressed no such "understanding" in the *SBC/Ameritech Merger Order*, which, in any event, predated the *Bell Atlantic/GTE Merger Order* by more than eight months.

II. The Commission Cannot And Should Not Modify SBC'S Voluntary MFN Commitment.

In the Public Notice, the Bureau asks whether there are grounds to modify SBC's MFN commitment.[15] The Bureau cannot and, even if it could, should not modify SBC's voluntary MFN commitment to include reciprocal compensation arrangements.

Whatever the Commission may have "understood" the term "interconnection arrangement" to mean in the Bell Atlantic/GTE Merger Conditions, that understanding cannot elucidate the meaning of the SBC/Ameritech Merger Conditions adopted more than eight months earlier.

In addition, read in toto, the *Bell Atlantic/GTE Merger Order* language cited by the Bureau in its December 12 Letter states: "This commitment encompasses, both for out-of-region and in-region agreements, entire interconnection agreements or selected provisions from them." *Id.* at 14171 n. 686. While this language appears in a note to the term "interconnection arrangement," it simply restates the terms of Bell Atlantic/GTE's in-region and out-of-region MFN commitments, both of which extend to "any interconnection arrangement, UNE, or provisions of an interconnection agreement (including an entire agreement)." *Id.* at Appendix D, paras. 30-31. The language cited thus seems to refer to Bell Atlantic/GTE's MFN commitments generally, not just "interconnection arrangements."

In any event, interpreting the term "interconnection arrangement" in the Bell Atlantic/GTE Merger Conditions (or, for that matter, in the SBC/Ameritech Merger Conditions) to encompass "entire interconnection agreements or selected provisions of them" would make no sense. Indeed, if the term "interconnection arrangement," rather than Bell Atlantic/GTE's MFN commitments generally, encompassed "entire interconnection agreements or selected provisions from them," there would have been no need for those Merger Conditions to refer to anything other than "interconnection arrangements." The fact that they did so establishes conclusively that the term "interconnection arrangement" in the Bell Atlantic/GTE Merger Conditions is not as broad as the Bureau's December 12 Letter suggests. Whatever the merits of the Bureau's analysis of the Bell Atlantic/GTE Merger Conditions and the statement in a footnote in the *Bell Atlantic/GTE Merger Order*, the term "interconnection arrangement" in SBC's MFN commitment cannot reasonably be read to encompass "entire interconnection agreements or selected provisions from them."

[15] In the Public Notice, the Bureau sought comment both on Birch's letter and a letter by Verizon requesting that the Bureau clarify that the Verizon MFN condition does not apply to provisions of an agreement that address intercarrier compensation for Internet traffic. *Public Notice*, DA 01-722 at 2. The Bureau further sought "comment on . . . whether there are grounds to waive or modify the relevant MFN conditions." *Id.* SBC assumes that the Bureau's request for comment on "modify[ing]" the relevant merger condition refers to SBC's MFN commitment because a "waiver" of that provision would simply relieve SBC of its MFN obligation. SBC observes that,

The merger conditions represent specific commitments made by SBC and Ameritech in conjunction with their applications for transfers of licenses and authorizations from Ameritech to SBC, and accepted by the Commission as sufficient to render those transfers in the public interest. Because SBC and Ameritech were agreeing to fulfill extensive obligations with potential payments in the billions of dollars for failures to meet those obligations, the provisions were carefully and narrowly drafted to avoid open-ended or vague obligations. Except in certain narrow circumstances (such as the carrier-to-carrier performance plan, which permits the Chief of the Common Carrier Bureau to add up to three qualifying submeasures for new services or UNEs), the conditions do not provide that the Bureau or Commission may modify SBC's voluntary commitments without its concurrence. The conditions thus represent an agreement between SBC/Ameritech and the Commission, and must be interpreted in that light.

SBC and Ameritech consummated their merger based upon the conditions as written and accepted by the Commission. While the Commission can, of course, waive one or more of these conditions for good cause, it cannot and should not up the ante after the fact, and impose new, more onerous requirements now that the merger is complete.[16] Moreover, even if the Commission could modify the conditions, it could do so only if it were to conclude that a modification was necessary in the public interest, and after notifying SBC of the specific grounds therefor. Because no such grounds have been offered, the Commission cannot modify the conditions. And if it cannot, it goes without saying that the Bureau is likewise constrained.

---

by asking whether there are grounds to modify SBC's MFN commitment, the Bureau itself recognizes that that commitment does not encompass reciprocal compensation as Birch claims.

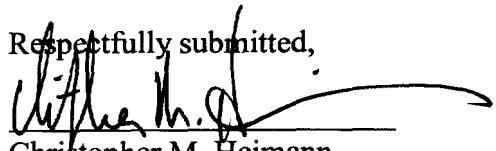
[16] Plainly, whatever authority the Commission may have to modify the conditions, that authority does not extend to the Bureau.

There is no basis to conclude that SBC's MFN commitment should be modified. In the *Merger Order*, the Commission concluded that SBC's commitment as written balanced competing policy considerations and was sufficient to promote the public interest. For this reason, the Commission rejected various requests by commenters to expand SBC/Ameritech's MFN commitment.[17] Nothing has changed in the intervening 18 months. Accordingly, the Commission should not expand SBC's voluntary MFN commitment beyond that contemplated by SBC and accepted by the Commission.

III. CONCLUSION

For the foregoing reasons, the Bureau should reject Birch's request.

Respectfully submitted,



Christopher M. Heimann
Roger K. Toppins
Paul K. Mancini

SBC COMMUNICATIONS INC.
1401 Eye Street, N.W.
Suite 1100
Washington, D.C. 20005
202-326-8909 - phone

Its Attorneys

April 30, 2001

[17] For example, the Commission declined a request to extend the condition to agreements negotiated by SBC affiliates prior to each entity's acquisition by SBC, concluding that applying the condition only on a going-forward basis would put SBC on notice as to which interconnection arrangements or UNEs could become uniform across its region. *SBC/Ameritech Merger Order*, 14 FCC Rcd 14712, at para. 492.

CERTIFICATE OF SERVICE

I, Anisa A. Latif, do hereby certify that a copy of the **Comments of SBC Communications Inc.** has been served on the parties below via first class mail – postage prepaid on this 30th day of April 2001.

By: Anisa A Latif
Anisa A. Latif

John Ivanuska
Birch Telecom, Inc.
2020 Baltimore Avenue
Kansas City, Missouri 64108 – 1914

Gordon R. Evans
Verizon
1300 I Street, NW
Suite 400 West
Washington, D.C. 20005